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# MILITARY PENSIONS AS DIVISIBLE ASSETS: THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

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## INTRODUCTION

One of America's fastest growing means of saving in recent years has been the accumulation of pension or retirement benefits.<sup>1</sup> As accrued benefits have become a significant share of family savings, couples facing divorce have found the legal question of the divisibility of benefits in a property settlement an important economic issue. Within the past two years, both the United States Supreme Court<sup>2</sup> and the Congress<sup>3</sup> have addressed the issue of divisibility of pension benefits within the context of federal military retirement pay. Since most states do not distinguish military retirement benefits from similar benefits derived from other public or private pension plans, the actions of the Supreme Court and Congress have important and potentially far-reaching consequences.

The military retirement pay system is a noncontributory pension program.<sup>4</sup> A regular or reserve commissioned officer who has served twenty years in the armed services, of which at least ten years were on active duty, is entitled to benefits upon retirement.<sup>5</sup> Benefit payments are based upon length of service and military rank,<sup>6</sup> are adjusted for changes in the Consumer Price Index,<sup>7</sup> and are taxable to the recipient

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1. For example, in 1960, 1,780,000 individuals were covered by private pensions which paid out \$1,720,000,000.00 in pension benefits. By 1970, 4,720,000 individuals were covered by private pensions which paid out \$7,360,000,000.00 in benefits. W. GREENOUGH & F. KING, PENSIONS PLANS AND PUBLIC POLICY 110 (1976) (quoting KOLODRUBETZ, *Two Decades of Employee-Benefit Plans*, SOCIAL SECURITY BULLETIN 35 (1972)).

2. *McCarty v. McCarty*, 453 U.S. 210 (1981).

3. Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 95th Cong., 2d Sess., 128 CONG. REC. H5957-59 (daily ed. Aug. 16, 1982) (to be codified at scattered sections of 10 U.S.C.) [hereinafter cited as Act].

4. See *Preliminary Review of Military Retirement Systems: Hearings before the Military Compensation Subcommittee of the House Committee on Armed Services*, 95th Cong., 1st and 2d Sess., 5 (1977-78) (statement of Col. Leon S. Hirsh, Jr., USAF, Director of Compensation, Office of the Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics) [hereinafter cited as *Military Retirement Hearings*].

5. 10 U.S.C. § 3911 (1976).

6. 10 U.S.C. §§ 3929, 3991 (1976).

7. 10 U.S.C. § 1401(A) (1976).

as ordinary income.<sup>8</sup> Military retirement pay terminates upon the retired service member's death.<sup>9</sup> However, the recipient may designate a beneficiary for any amounts due but not yet paid, or may arrange for an annuity for designated survivors by electing reduced payments.<sup>10</sup>

In *McCarty v. McCarty*,<sup>11</sup> the Supreme Court held that military retirement benefits are not subject to division in divorce actions because division would cause clear and substantial damage to important federal interests.<sup>12</sup> The Supreme Court's decision in the *McCarty* case prompted Congress to pass the Uniformed Services Former Spouses' Protection Act (Act).<sup>13</sup> Declaring military retirement pay to be a potentially divisible asset for property settlement in divorce,<sup>14</sup> the Act overruled the *McCarty* decision and returned the issue to the states.<sup>15</sup> The Act has been called the most significant piece of legislation benefiting women to come out of the 97th Congress.<sup>16</sup> First introduced in the House of Representatives by Rep. Patricia Schroeder (D-Colo.),<sup>17</sup> and later sponsored in the Senate by Sen. Roger Jepsen (R-Iowa),<sup>18</sup> Chairman of the Senate Armed Services Committee Subcommittee on Manpower and Personnel, the bill became law on February 1, 1983.<sup>19</sup>

This article will begin with an analysis of the *McCarty* decision. It will then examine the major provisions of the Uniformed Services Former Spouses' Protection Act. Of special concern will be the scope of the Act and its impact upon military families. This analysis will also address the potential economic implications of the Act. In addition, it will illustrate how the presence of pensions affects the level of family savings and how the Act may result in disparity in property distributions to husbands and wives, depending upon their state of residence when they file the dissolution petition. Finally, this article will address the conflicting legal issues left unresolved in the wake of *McCarty* and the Uniformed Services Former Spouses' Protection Act.

### *McCarty v. McCarty*

On March 26, 1981, the United States Supreme Court heard arguments on the issue of military retirement pay as a divisible community asset for purposes of property settlement upon divorce.<sup>20</sup> The Court's

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8. 26 U.S.C. § 61(a)(11) (1976 & Supp. V 1981).

9. 453 U.S. at 215.

10. 10 U.S.C. § 2771 (1976).

11. 453 U.S. 210 (1981).

12. *Id.* at 232.

13. *Supra* note 3.

14. Act, *supra* note 3, § 1002(a) (to be codified at 10 U.S.C. § 1408(c)(1)).

15. *Id.*

16. Des Moines Reg., Sept. 11, 1982, at 10A, Col. 3.

17. H.R. 2817, 2 CONG. INDEX (CCH) 28,294 (March 13, 1979).

18. S. 1814, 1 CONG. INDEX (CCH) 14,231 (Nov. 4, 1981).

19. Act, *supra* note 3.

20. 453 U.S. 210.

holding in *McCarty v. McCarty* firmly established military pensions as separate, non-divisible property.

In 1976, after nineteen years of marriage, Dr. Richard McCarty filed a petition for the dissolution of his marriage in the Superior Court of California. Dr. McCarty had married his wife, Patricia, while he was a second year medical student. In his fourth year of medical school, Dr. McCarty went on active duty in the United States Army. Eighteen years later, when the petition for dissolution was filed, Dr. McCarty held the rank of colonel.

At the time of the *McCarty* decision, California law treated pension rights as divisible property even if not vested at the time of the dissolution of the marriage.<sup>21</sup> The California Superior Court held that Dr. McCarty's military pension was quasi-community property and ordered him to pay his wife a specified portion.<sup>22</sup> The California Court of Appeals affirmed the award. Dr. McCarty's subsequent petition to the California Supreme Court was denied.<sup>23</sup>

On certiorari, the issue presented to the United States Supreme Court was "whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws."<sup>24</sup> The Court held that federal law did preclude such division.

The Court began its analysis by noting that "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden."<sup>25</sup> Citing its earlier decision in *Hisquierdo v. Hisquierdo*,<sup>26</sup> the Court stated that the preemption test is "whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition."<sup>27</sup> The Court then applied this test to determine whether Mrs. McCarty's state-designated right to a share of her ex-husband's military pension negatively and materially affected existing federal law. Such an effect would preclude recognition or adherence to the state right.<sup>28</sup>

21. See, *In re Brown*, 15 Cal. 3d 838, 544 P.2d 561 (1976).

22. Appellant's Opening Brief at 45, *McCarty v. McCarty*, 453 U.S. 210 (1981).

23. App. to Juris. Statement 83, *McCarty v. McCarty*, 453 U.S. 210 (1981) (noting the California Supreme Court's denial of cert.).

24. *McCarty*, 453 U.S. 210, 211 (1981).

25. *Id.* at 220 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)).

26. 439 U.S. 572 (1979).

27. *McCarty*, 453 U.S. at 221 (quoting *Hisquierdo*, 439 U.S. at 583).

28. The Court began by distinguishing retired military pension benefits from other types of pensions, noting that "[t]he retired officer remains a member of the Army. . . ." *McCarty*, 453 U.S. at 221. In addition, the Court found that the retired officer "remains subject to recall to active duty by the Secretary of the Army 'at any time.'" *Id.* at 222. Consequently, the Court concluded that "military retired pay is reduced compensation for reduced current services." *Id.* While the Court offered this characterization of retired military pensions, it nevertheless proceeded to reason that such a characterization was not central to its holding. Instead, the Court continued, "[w]e agree with appellant's alternative argument that the application of

The Supreme Court concluded that California's community property law did conflict with existing federal law. The Court's conclusion was based on its finding that the pertinent California law<sup>29</sup> neither defined, classified, nor discussed the scope of the pension's entitlement.

The Supreme Court began its analysis with an historical examination of various legislative schemes enacted to ensure military retirement payments and to allow the retiring officer to provide for survivors. The Court found that these developments indicated that military nondisability pension pay to the retiree is of a personal nature and therefore not subject to division in divorce.

Similarly, the Court noted that on several occasions, Congress had not availed itself of opportunities to specify an ex-spouse as a person entitled to military retirement funds.<sup>30</sup> The Court viewed Congress' failure to specify an entitlement for any person other than the retired officer as indicating legislative intent not to recognize any other lawful claim. Distinguishing its earlier holding in *Hisquierdo*,<sup>31</sup> which involved spousal entitlement to an annuity created under the Railroad Retirement Act, the Court noted the absence of any language, such as is found in the Railroad Retirement Act, which would create an entitlement or permit a separate annuity for the retired member's spouse.<sup>32</sup>

The Supreme Court bolstered its conclusion through an analysis of the Retired Serviceman's Family Protection Plan (RSFPP)<sup>33</sup> and the Survivor's Benefit Plan (SBP).<sup>34</sup> Under these plans, "the service member is free to elect to provide no annuity at all, or to provide an annuity payable only to the surviving children, and not to the spouse."<sup>35</sup> Under either plan, the service member may designate a beneficiary of an annuity and not provide for the spouse. The Court reasoned that if retire-

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community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation." *Id.* at 223.

While the distinction between compensation for current services and compensation for past services was ultimately not important in *McCarty* because of the preemption issue, this distinction could be determinative in other situations. Generally, current compensation is not viewed as a divisible asset for property settlement purposes while compensation for past services (*i.e.*, pensions) may be divisible depending upon state law.

29. Cal. Civ. Code §§ 5118, 5119 (West 1970 and Supp. 1981).

30. *McCarty*, 453 U.S. 210, 224-32 (1981).

31. 439 U.S. 572. The Supreme Court held that the Railroad Retirement Act of 1974 prohibits the allocation and division of retirement benefits for railroad employees for purposes of property settlement in divorce. The Court rejected the holding of the California Supreme Court that the benefits were divisible because their eventual receipt was based on work done at least in part during the marriage. The Court noted that railroad retirement benefits are not contractual and could be changed by Congress at any time. Furthermore, the Railroad Retirement Act specifically provides for a spousal benefit which ceases on divorce. The Court also emphasized the strong anti-attachment provisions of the Railroad Act which evidence congressional intent to guarantee the railroad employee full entitlement to retirement benefits.

32. *McCarty*, 453 U.S. at 224.

33. *Id.* at 215-16, 226-30 (discussing the Retired Servicemen's Family Protection Plan, 10 U.S.C. §§ 1431-1446 (1976 & Supp. IV 1980)).

34. 453 U.S. at 215-16, 226-30 (discussing the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455) (1976 & Supp. IV 1980).

35. *McCarty*, 453 U.S. at 226.

ment pay and any annuity that might flow therefrom was considered community property, the service member's spouse would automatically have rights to one-half of the annuity, thus rendering the designation provision meaningless.

The Supreme Court noted that the "personal entitlement" concept was necessary to avoid an outcome which would "have the anomalous effect of placing an ex-spouse in a better position than that of a widower or a widow under the RSFPP and the SBP."<sup>36</sup> The Court suggested that this outcome could result in a situation where, upon divorce, the nonmilitary spouse would be awarded an immediate sum certain to offset the future pension receipt awarded the service member. Presumably, this offsetting amount would be the property of the nonmilitary spouse from the date of the decree. On the other hand, since military pension benefits cease upon the death of the service member, the surviving spouse would not have the protection of this present value received for future income.<sup>37</sup>

Lastly, the Court pointed to the rejection of a proposed provision of the SBP which "would have allowed attachment of up to 50% of military retired pay to comply with a court order in favor of a spouse, former spouse, or child."<sup>38</sup> This provision was excluded from the bill's final draft.<sup>39</sup>

Once the Court determined that the personal entitlement concept created a conflict between congressional intent and state community property rights, it turned to the question of "whether the 'consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecognition.'"<sup>40</sup> The Court noted: "[f]rom its inception, the military nondisability retirement system has been 'as much a personnel management tool as an income maintenance method.'"<sup>41</sup> The Court concluded that an injury did exist, basing its decision on four considerations. First, any community property interest which Mrs. McCarty might claim would necessarily decrease the amount of the benefit intended solely for the retiree.<sup>42</sup> Second, any community property division, or potential for division, might undercut the various plans which "Congress has devised to encourage a service member to set aside a portion of his or her retired pay as an annuity for a surviving spouse or dependent children."<sup>43</sup> Third, if the value of re-

36. *Id.* at 227.

37. *See infra* note 42 and accompanying text for a discussion of this concern as a continuing issue.

38. *McCarty*, 453 U.S. at 229.

39. *Id.* at 229, 231.

40. *Id.* at 232 (quoting *Hisquierdo*, 439 U.S. 572, 581-83).

41. *McCarty*, 453 U.S. at 212-13.

42. This argument seemed to follow naturally from the Court's earlier discussion and conclusion about the pension as a personal entitlement. Obviously, if a spouse could make a valid claim for some share of the benefit, the retiree would not be the sole beneficiary. *Id.* at 233.

43. If a service member had to consider the possibility that he or she might be forced to contribute retirement pay to a community property settlement, he or she might be reluctant to pledge any of the sum as an annuity fund now. This reluctance might adversely affect sur-

tired pay was, as the Court posited, intended as an inducement for enlistment or reenlistment,<sup>44</sup> the service member must be able to count on receipt of the pay.<sup>45</sup> Lastly, the Court reasoned that inclusion of military retirement pension benefits as community property would directly and adversely affect "the goals of encouraging orderly promotion and a youthful military."<sup>46</sup>

In concluding its opinion, the Court called upon Congress to clarify its intent if indeed the *McCarty* holding did not correctly reflect it. Citing the deference accorded to congressional authority in the military area, the Court suggested it had attempted only to interpret congressional intent. The Court concluded succinctly that whether the former spouse's plight warranted more attention or protection was a "decision . . . for Congress alone."<sup>47</sup>

Justice Rehnquist, writing for the dissent, chided the majority for failing to correctly "quote or cite the test for preemption which *Hisquierdo* established."<sup>48</sup> He concluded that the *Hisquierdo* Court had reiterated its reluctance to become involved in questions of marriage law stating that "[o]n the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted."<sup>49</sup> Justice Rehnquist argued in *McCarty* that the majority cited no "direct enactment" which preempts the California community property law. He suggested that, at best, the majority used an indirect approach by relying on silence to imply legislative intent.<sup>50</sup> He concluded, therefore, that the federal law should not be found to preempt the state law at issue.

Additionally, Justice Rehnquist noted that while the majority provided an analysis of laws and legislative history, it did so only in regard to laws and legislation not directly related to the case at bar.<sup>51</sup> In particular, he criticized the comparison of legislation dealing with alimony and child support to *McCarty*, a case dealing with a property settlement. As he noted, these are distinct rights, and the garnishment issue, which is often raised in alimony or child support cases, was not raised

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viving heirs of the service member, a consequence which the Court reasoned Congress had sought to avoid by the passage of the various annuity plans. *Id.*

44. *Id.* at 234.

45. So, the argument continued, if the service member was divorced while living in a state which regarded the value of the pension as a community asset for purposes of the property settlement, the member or potential service member might seriously reconsider whether to reenlist. *Id.*

46. *Id.* at 235. Interestingly, this same argument was raised in *Hisquierdo* where the Court noted that a purpose of the railroad retirement benefits was to "assure more rapid advancement in the service and also more jobs for younger workers." 439 U.S. at 573-74.

47. *McCarty*, 453 U.S. at 236.

48. *Id.* (Rehnquist, J., dissenting).

49. *Id.* at 236 (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)).

50. *McCarty*, 453 U.S. at 236, 237.

51. *Id.* at 237.

in *McCarty*.<sup>52</sup>

### Post-*McCarty* Decisions

Following the decision in *McCarty*, numerous litigants sought review of divorce awards dividing retirement pay as part of a property settlement. The cases were generally decided on two issues: (1) the finality of the divorce decree, and (2) the retroactivity of *McCarty*.

In *Ex parte Welch*,<sup>53</sup> the Texas Court of Appeals refused to apply *McCarty* retroactively and upheld a division of military nondisability retirement pay. Relying on *McCarty*, Mr. Welch stopped payments of his military retirement benefits to his wife as ordered in a decree of divorce. The district court found Mr. Welch in contempt of court and jailed him. On appeal, Mr. Welch argued the Texas community property laws were expressly preempted by federal statutes on military nondisability retirement pay; consequently, the pre-*McCarty* decree was void. However, the court of appeals held that the decree ordering the division of a military pension was neither void nor subject to collateral attack and remanded Mr. Welch to the sheriff's custody.<sup>54</sup> In so holding, the court of appeals noted that *McCarty* would be applied ret-

52. *Id.* This argument is certainly consistent with the decisions of several state courts which hold that while military pensions may not be distributed as part of a property settlement, they may be valued for purposes of ability to pay alimony or child support. See *infra* notes 122 and 123 and accompanying text. It is important to distinguish, as the Court in *Hisquierdo* did, a property settlement from alimony or child support. Congress amended the Social Security Act in 1975 to provide for attachment of federal benefits in order to meet legal obligations of child support or alimony. Pub. L. No. 93-647, § 101(a), 88 Stat. 2357 (codified at 42 U.S.C. § 659 (1976 & Supp. II 1978)). The provisions state:

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

42 U.S.C. § 659 (1976 & Supp. II 1978).

A 1977 Social Security Act provision defined "alimony" and carefully distinguished it from payments under a property settlement. Act of May 23, 1977, Pub. L. No. 95-30, § 462(c), 91 Stat. 116, 160 (1977). This Act specifically states that alimony "does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."

In sum, the Court in *Hisquierdo* found that to the extent that California's community property laws would divide railroad retirement benefits, they materially conflicted with the purpose of the Federal Railroad Retirement Act and so could not be enforced. In *Hisquierdo*, as in *McCarty*, Justices Stewart and Rehnquist dissented, arguing that there was an insufficient showing that state law conflicted with federal law.

Indeed, the federal 'policies' the Court perceives amount to little more than the commonplace that retirement benefits are designed to provide an income on retirement to the employee. There is simply nothing in the Act to suggest that Congress meant to insulate these pension benefits from the rules of ownership that in California are a normal incident of marriage.

*Hisquierdo*, 439 U.S. at 591.

53. 633 S.W.2d 691 (Tex. Civ. App. 1982).

54. *Id.* at 693.



roactively only to cases in which judgments were pending at the time of the *McCarty* decision. The court cited the earlier Fifth Circuit opinion in *Ersparan v. Bodgett*<sup>55</sup> in support of this distinction. The court in *Ersparan* found that:

[t]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested upon a legal principle subsequently overruled in another case. . . . Nothing in *McCarty* suggests that the Supreme Court therein intended to invalidate, or otherwise render unenforceable, prior valid and subsisting state court judgments. Absent some indication of such an intent, we decline to do so.<sup>56</sup>

Interestingly, the court cited the dissent in *McCarty* in support of its refusal to retroactively apply *McCarty*, stating: "Congress did not 'positively require by direct enactment' that our state community property laws be preempted as to the military nondisability retired pay."<sup>57</sup>

In contrast to *Ex parte Welch*, the Arizona Appellate Court reversed a lower court award of an interest in future military retirement pay. In *Sandoval v. Sandoval*,<sup>58</sup> the Yuma County Superior Court had awarded Mrs. Sandoval a proportionate interest in her former spouse's military retirement income, based on a petition of modification of the original decree.<sup>59</sup> However, the Arizona Appellate Court concluded that "*McCarty* . . . has effectively overruled the holdings of our supreme court . . . and that portion of the order of the trial court regarding retirement benefits must be reversed."<sup>60</sup> While the court did not explicitly distinguish this case based on the modification of the original decree, a concurring opinion notes that such questions regarding the propriety of *McCarty* application "will of necessity have to proceed on a case-by-case basis . . . ."<sup>61</sup>

Finally, *Wintriss v. Superior Court*<sup>62</sup> raised the post-*McCarty* divisibility issue at another procedural juncture. *Wintriss* also involved a trial court award of military retirement pay to the non-member spouse. However, "the trial court characterized the pension payments as community property *but reserved jurisdiction to characterize the pension plan if the law changed*."<sup>63</sup> While the issue of divisibility was heavily liti-

55. 659 F.2d 26 (5th Cir. 1981).

56. *Id.* at 28 (quoting in part *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)).

57. *Welch*, 633 S.W.2d at 693.

58. 634 P.2d 405 (Ariz. Ct. App. 1981).

59. *Id.* at 405. On January 17, 1977, the decree of dissolution was granted. The property settlement therein did not mention the military retirement pay. In December 1978, Mrs. Sandoval filed a petition for modification from which the subsequent appeal was taken.

60. *Id.* at 406.

61. *Id.* (Conteras, J., concurring).

62. No. 26537, slip. op. (Cal. Ct. App. May 19, 1982).

63. *Id.* at 696 (emphasis added). The actual language in the decree read "that as to the military retired pay of petitioner . . . jurisdiction is reserved to divide or find them to be the separate property of one or the other party in light of later decisional or statutory law." *Id.* The Court also noted that Mr. Wintriss relied on the reservation of jurisdiction to preserve his right to later challenge the division if the law was ultimately changed. *Id.*

gated at the trial level, neither party appealed the trial court's reservation of jurisdiction.<sup>64</sup>

Following *McCarty*, Mr. Wintriss moved the trial court to discontinue the division of his military retirement pay. The trial court not only declined to order the requested modification but ruled that its earlier reservation of jurisdiction was "void as an act in excess of the jurisdiction of the Court."<sup>65</sup> The trial court reasoned that "public policy requires finality of judgments" and declined Mr. Wintriss' motion. Neither party appealed the trial court's refusal to reopen the pension issue, but the appellate court issued an alternate writ of mandamus to facilitate a speedy resolution. According to the court of appeals,

[o]nce a military retirement pension has been classified as community property, it can not be reclassified as separate if (1) the judgment became final before *McCarty* or (2) was then pending on an appeal which did not challenge the characterization (*In re Marriage of Sheldon* (1981) 124 Cal. App. 3d 371 (177 Cal. Rptr. 380)), or (3) if the parties stipulated to the community property characterization in the trial court (*In re Marriage of Mahone* (1981) 123 Cal. App. 3d 17 (176 Cal. Rptr. 274)).<sup>66</sup>

In *Wintriss*, there was no stipulation or final classification of the pension as community property. Therefore, the appellate court reasoned, the issue was still open for redetermination. As the court noted, had either party taken an appeal from the reservation clause in the initial decree, the divisibility issue would have been finalized. The court concluded that Mr. Wintriss was now entitled to have the pension classified and remanded the question to the superior court for its judgment (presumably to be in accord with *McCarty*).<sup>67</sup>

#### Uniformed Services Former Spouses' Protection Act

The Uniformed Services Former Spouses' Protection Act amends section 2(a) of chapter 71 of title 10<sup>68</sup> of the United States Code. The Act provides that, "a court may treat disposable retired or retainer pay payable to a member [of the military] for periods beginning on or after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."<sup>69</sup> The Act effectively overrules *McCarty* by specifically declaring that military pensions may be considered joint assets for the purpose of property division in a divorce proceeding. However, the Act clearly intends that while such pensions may be viewed as commu-

64. *Id.*

65. *Id.*

66. *Id.*

67. Several other cases have raised the retroactivity issue. See, e.g., *Erbe v. Eady*, 406 So. 2d 936 (Ala. Civ. App. 1981).

68. Act, *supra* note 3 (amending 10 U.S.C. §§ 1401-1406 (1979)).

69. Act, *supra* note 3 § 1002(a) (to be codified at 10 U.S.C. § 1408(a)(6)(C)(1)).

nity property,<sup>70</sup> "this section does not create any right, title or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse."<sup>71</sup> Declaring military retirement pensions as potentially divisible community property, the Act then delineates limits on the division of such benefits and the manner in which they may be divided.<sup>72</sup>

The Act begins with a series of definitions, several of which are especially pertinent. "Court order" includes decrees for child support payment, alimony payment, and property division, provided that such an order defines payment in terms of a dollar amount or as a percentage of disposable retired or retainer pay.<sup>73</sup> The Act defines "disposable retired or retainer pay" as "the total monthly retired or retainer pay to which a member is entitled,"<sup>74</sup> less amounts due and owing to specified obligors. In addition to listing the usual armed forces pay deductions,<sup>75</sup> this section includes payments to obligors which "are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section."<sup>76</sup>

Section (c)(4) of the Act establishes a jurisdictional limit on treating disposable military retirement pay as a community asset. This section prohibits a court from classifying and dividing military retirement pay, "unless the court has jurisdiction over the members by reason of (A) his residence, *other than because of military assignment*, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court."<sup>77</sup> This section may reflect an attempt to avoid *McCarty*'s criticism that military members generally have little control over where they are stationed, thereby subjecting their retirement pay to division because the service member was stationed in a state recognizing pensions as marital property. Under the Act, it is possible for a service member retaining domicile in a state not recognizing military retirement pay as a marital asset to avoid division of the military pension. However, the Act permits a service member to consent to jurisdiction in the state in which the member is stationed.<sup>78</sup>

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70. *Id.*

71. *Id.* (to be codified at 10 U.S.C. § 1408(a)(6)(C)(2)).

72. Notably, the Act does not mandate any minimum length of a marriage before the pension may be considered community or joint property. The House amendment included a caveat that would have limited consideration of military retirement pay as community divisible property only "if the marriage lasted 10 years while the service member was performing creditable service." 128 CONG. REC. H5999 (daily ed. Aug. 16, 1982). This amendment was deleted by the conferees.

73. Act, *supra* note 3, § 1002(a) (to be codified at 10 U.S.C. § 1408(a)(2)(C)).

74. *Id.* (to be codified at 10 U.S.C. § 1408(a)(4)).

75. *Id.* (to be codified at 10 U.S.C. § 1408(a)(4)(A)-(D)).

76. *Id.* (to be codified at 10 U.S.C. § 1408(a)(3)(F)).

77. *Id.* (to be codified at 10 U.S.C. § 1408(c)(4)) (emphasis added).

78. *Id.* (to be codified at 10 U.S.C. § 1408(c)(4)(C)). The Act's garnishment procedure is specifi-

Under the Act, the maximum amount available for distribution in a divorce action shall not exceed fifty percent of the net pension benefit.<sup>79</sup> With this provision, the Act also provides for the situation involving more than one person (spouse or former spouse) with a court ordered entitlement to the retirement pay. In section (e)(2), the Act provides for a first-come, first-serve system up to the maximum fifty percent available. In the event of conflicting court orders involving the same parties, the Act provides that payment shall be made in the *lesser* of the conflicting amounts (again up to the maximum fifty percent allowable) with the difference between the highest amount shown in conflicting court orders and the amount paid, up to the fifty percent maximum, being withheld.<sup>80</sup>

While the Act limits the amount of money which may be diverted from the member's retirement pay, the Act "shall [not] be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order. . . ."<sup>81</sup> Thus, while the Act may limit payments from military retirement pay, a creditor can obtain payment from the member's other available resources or assets. The Act does not limit the total amount of a service member's indebtedness but rather limits collecting indebtedness from the service member's retirement pay. In this regard, the Act essentially does no more than most garnishment laws in establishing a collection ceiling. The clear intent of the Act is to protect retired members from financial deprivation.

Finally, the Act avoids the retroactivity issues resulting from *McCarty*<sup>82</sup> by providing the following instruction regarding modification of court orders finalized before *McCarty*:

[modifications] should not be recognized if those changes were effected after the *McCarty* decision (and before the effective date of the new title X) to implement the holding in that decision (for example, a modification setting aside a pre-*McCarty* division of military retired pay).

. . . In other words, the courts should not favorably consider ap-

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cally limited to situations where the marriage lasted ten years or more and the service member performed at least ten years of creditable service during that time. If either condition is not met, the military retirement pay may still be considered community property for asset valuation but will not be subject to division by attachment. While there is some question whether the duration of a marriage can serve as a basis for federal enforcement remedies, this restriction is not peculiar to this Act. *Id.* (to be codified at 10 U.S.C. § 1408(d)(2)).

79. *Id.* (to be codified at 10 U.S.C. § 1408(e)(1)). It is important to remember that this disposable retirement pay is the net pay based on the total retirement pay less the initial offsets set out in § 1408(e)(4)(A)-(F). Section 1408(e)(4)(B) speaks to the total amount of disposable retirement pay that can be attached under both the Act and section 459 of the Social Security Act, 42 U.S.C. § 659 (1976 & Supp. II 1978) which allows garnishment of the service member's retirement pay for purposes of child support and alimony. In sum, the Act provides that: (1) no more than 50% of the member's disposable retirement pay can be attached under the Act, regardless of the number of court orders outstanding under the Act; and (2) no more than 65% of the member's disposable retirement pay can be attached by the total of court orders under both this Act and the Social Security Act.

80. Act, *supra* note 3, § 1002(a) (to be codified at 10 U.S.C. § 1408(e)(3)(A)(i)-(iii) and (e)(3)(B)).

81. *Id.* § 1002(e)(6) (to be codified at 10 U.S.C. § 1408(e)(6)).

82. See *supra* notes 53-56 and accompanying text.

plications based on the enactment of this title to reopen cases finalized before the *McCarty* decision wherein military retired pay was not divided.<sup>83</sup>

By implication, divorces occurring after *McCarty* (June 26, 1981) may be reconsidered and division of military retirement pay ordered.

The Act explicitly relieves "[t]he United States and any officer or employee"<sup>84</sup> thereof from liability with respect to any payment made according to legislative prescriptions and includes a provision for notifying any member affected by a court order received under the Act.<sup>85</sup>

The Uniformed Services Former Spouses' Protection Act adds several new paragraphs to the Survivor's Benefit Plan, presumably to reflect changes effected by the Act.<sup>86</sup> Notably, these amendments include provisions permitting service members to "provide an annuity to a natural person with an insurable interest in that person *or to provide an annuity to a former spouse*."<sup>87</sup> A married member or a dependent child may elect to provide an annuity for a former spouse instead of providing such an annuity to the current spouse or dependent child. This latter election is permissible only if done "to carry out the terms of a written agreement entered into voluntarily with a former spouse (*without regard* to whether such agreement is included in or approved by a court order)."<sup>88</sup> The apparent intent is to allow a service member and ex-spouse to mutually agree on divorce settlement terms. Presumably, the annuity might be provided instead of a later reduction in retirement pay resulting from a division agreement in a property settlement.

The language of the Act does not preclude an ex-spouse from receiving both a percentage of the member's retirement pay and an annuity under the SBP. Arguably, the biggest problem with this language is the recognition of a "voluntary written agreement" not necessarily part of a court order.<sup>89</sup> While the legislature obviously addressed the validity question by requiring a writing, it is easy to envision myriad questions and litigation which will arise from enforcing this section. Potential issues include the voluntariness, legitimacy, or unconscionability of the agreement. Conceivably, a current spouse might argue collusion or conspiracy between the spouse and former mate. The language contains no terms dictating necessary timing or specifying when the voluntary agreement may be established. Presumably, a service member could enter into an agreement with a former spouse even though one of them had remarried.<sup>90</sup>

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83. 128 CONG. REC. H5999 - 6000 (daily ed. Aug. 16, 1982).

84. Act, *supra* note 3, § 1002(a) (to be codified at 10 U.S.C. § 1408(f)(1)).

85. *Id.*

86. *Id.* § 1003(a) (to be codified at 10 U.S.C. § 1447).

87. *Id.* § 1003(b)(2) (to be codified at 10 U.S.C. § 1447) (emphasis added).

88. *Id.* (emphasis added).

89. *Id.*

90. For instance, a service member may prefer to provide an annuity rather than make regular payments from his or her pay and so might seek to modify a court-ordered periodic, current payment plan.

Confronting the possible problems generated by enforcement, section 1448(b)(4) of the Act states that if a service member elects to provide an annuity to a former spouse, the member must provide the appropriate secretary (of the member's branch of the armed services) with a written statement at the time of election, signed by the service member and the member's former spouse.<sup>91</sup> This statement must specify whether the election is made "pursuant to a voluntary written agreement previously entered into by such person as a part of or incident to a proceeding of divorce, dissolution, annulment, or legal separation, and if so, whether such voluntary written agreement has been incorporated in or ratified or approved by a court order."<sup>92</sup> The section offers some evidence which the Secretary of Defense might use to assess the election's validity and to resolve future challenges to the election. However, while this section requires the member to state why the election is made, it does not necessarily preclude such an election from being made under circumstances other than a divorce proceeding.

Section 1450(f)(1) of the Act retains the nonbinding aspect of an SBP election.<sup>93</sup> This section permits a member to revoke an earlier election and change an annuity in favor of a current spouse or dependent child.<sup>94</sup> However, the Secretary must notify the former spouse or other person to whom the annuity was formerly designated.<sup>95</sup> Having thus allowed the member to change the designation, the section continues with an interesting caveat. If the annuity provision was made to a former spouse as part of a voluntary written agreement "incident to a proceeding of divorce, dissolution, annulment, or legal separation,"<sup>96</sup> revocation of the election is conditioned by the following:

- 1) If the election was made pursuant to a stipulation which has been ratified or incorporated in a court order, then a court-ordered modification must be produced;<sup>97</sup> or
- 2) If the election was purely voluntary and not court mandated, the former spouse must provide written acknowledgement of the change in annuity status.<sup>98</sup>

Potential litigation involving the issues of fraud and duress from the latter provision seems certain. Furthermore, an initial election voluntarily providing an annuity to the former spouse may be effectively irrevocable by the former spouse's refusal to consent to the change. While this consideration may protect the expectations of the former spouse, it may also mean fewer elections or more litigation.

Finally, the amendments to the SBP clearly preclude a court-or-

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91. Act, *supra* note 3, § 1003(b)(2) (to be codified at 10 U.S.C. § 1447).

92. *Id.*

93. *Id.*

94. *Id.* § 1003(d) (to be codified at 10 U.S.C. § 1450(f)(1)).

95. *Id.*

96. *Id.* § 1003(d) (to be codified at 10 U.S.C. § 1450(f)(2)).

97. *Id.* § 1003(d) (to be codified at 10 U.S.C. § 1450(f)(2)(A)).

98. *Id.* § 1003(d) (to be codified at 10 U.S.C. § 1450(f)(2)(B)).

dered annuity. Section 1450(f)(3) provides that "[n]othing in this chapter authorizes any court to order any person to elect . . . to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to make such an election."<sup>99</sup> The legislature clearly distinguished between military retirement pay and a survivor's annuity. While the former may be ordered divided or attached, the latter, except to enforce an agreement of the parties, may not.<sup>100</sup>

The concluding sections of the Act amend United States Code provisions relating to medical and dental care of military personnel and their dependents.<sup>101</sup> Succinctly, the Act ensures that an unremarried ex-spouse can continue to receive medical and dental care for an extended time period.<sup>102</sup> An important proviso limits eligibility to marriages which have lasted at least twenty years, during which time the service member must have performed at least ten years of creditable service.<sup>103</sup> Additionally, an unremarried former spouse may not be contemporaneously covered under an employer-sponsored health plan.<sup>104</sup> Lastly, an unremarried former spouse may continue use of the commissary and the post-exchange.<sup>105</sup>

### THE PENSION ISSUE

*McCarty* and the Uniformed Services Former Spouses' Protection Act both address the issue of divisibility of military pension benefits upon divorce. Controversy involving military pensions forms part of a broader issue involving division of any pension benefit. Significantly, while both *McCarty*<sup>106</sup> and the Act<sup>107</sup> specifically refer to *military* pension benefits, state courts have not generally regarded military pensions as substantially different from other forms of retirement compensation in divorce settlements. Instead, states apply their rules to military and private pension plans in like manner. Given this compatibility in the treatment of pension programs, the following discussion focuses on whether the fifty states permit division of pension benefits in dissolutions. Identifying individual state positions on pension division will assist in understanding how the Act will affect division of military retirement pay in each state.<sup>108</sup>

Generally, a state's divisibility decision is based on one of the three

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99. *Id.* § 1003(d) (to be codified at 10 U.S.C. § 1450(f)(3)).

100. *Id.*

101. *Id.* § 1004(a) (to be codified at 10 U.S.C. § 1072(2)).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* § 1005.

106. 453 U.S. at 211.

107. Act, *supra* note 3.

108. The issue of division under consideration here is *not* the percentage of property which either spouse is awarded or is necessarily entitled to, a 50-50 split, or some other measure. Instead, the central questions are whether the pension can be included in the marital asset pool for the purpose of determining the total worth of the family's assets and whether the actual pension payment can be divided or attached.

following criteria:<sup>109</sup>

- (1) Are pension benefits regarded as an expectancy at the time of divorce?
- (2) If the benefits are property, are they separate property?
- (3) If the benefits are marital property, is division and distribution of the pension benefits permissible?

If any of these questions is answered in the affirmative, state courts may deny inclusion as marital property or division.<sup>110</sup> States including pension benefits in the property division hold that pension benefits are property,<sup>111</sup> that a portion of the benefit accumulated during the marriage is marital property,<sup>112</sup> and that marital property is divisible.<sup>113</sup>

### *Nondivisibility of Benefits*

Among states excluding pension benefits from marital assets are those that consider pension benefits as creating only an expectancy and not a property right.<sup>114</sup> If pension benefits are adjudged a "mere expectancy," there is no asset existing at the time of divorce which can be divided. In concluding that pension plans create only expectancies, many states that equitably distribute marital property have focused on the idea that retirement programs do not possess recognizable attributes of property.<sup>115</sup> Perhaps the clearest illustration of the equity states' position is presented by the Colorado Court of Appeals in *In re Marriage of Ellis*.<sup>116</sup>

*Ellis* involved the dissolution of a twenty year marriage in which the husband was already receiving an Army pension. The Court ruled

109. See generally *infra* notes 111-14 and accompanying text.

110. See, e.g., *Bachman v. Bachman*, 274 Ark. 23, 621 S.W.2d 701 (1981) (accumulation in a profit-sharing trust arrangement and in a money purchase pension plan belonging to the husband which can be withdrawn by him at the time of the divorce is "marital property" and the wife is entitled to her share of her husband's vested interest. But vested pensions or retirement benefits which are not yet distributable under Arkansas law are not divisible); *In re Marriage of Mitchell*, 195 Colo. 399, 579 P.2d 613 (1977) (fully vested retirement funds are marital property divisible upon divorce in accord with *Ellis*, see *infra* note 116 and accompanying text); *Carpenter v. Carpenter*, 657 P.2d 646 (Okla. 1983) (pensions acquired during the marriage, vested or not, may be subject to division upon divorce but a trial court's award of all of pension to the husband with the wife receiving other equivalent value property is not improper).

111. See, e.g., *Payne v. Payne*, 82 Wash. 2d 573, 512 P.2d 736 (1973) (pension and/or retirement benefits characterized as property which must be divided at dissolution).

112. See, e.g., *Bachman v. Bachman*, 274 Ark. 23, 621 S.W.2d 701 (1981) (pension plan belonging to husband is part of marital property even if husband can withdraw it at time of divorce).

113. See, e.g., *In re the Marriage of Mitchell*, 195 Colo. 399, 579 P.2d 613 (1977) (vested retirement fund is marital property and distributable upon divorce).

114. An expectancy is defined as a future interest over which the holder has no enforceable right.

115. Equitable distribution states ("equity states") do not divide marital property according to a mandated split (e.g., 50/50) but rather utilize a variety of factors to effect property distribution. There are approximately forty states which utilize an equitable distribution scheme for property settlement or, in some instances, only for alimony maintenance. For a complete listing and discussion, see D. Freed & J. Foster, *Family Law In The Fifty States: An Overview As of September 1982*, 8 FAM. L. REP. (BNA) 4065, 4079 (Sept. 28, 1982).

116. 96 Colo. App. 234, 538 P.2d 1347 (1975).



that pension payments to the husband were not property includable among the couple's marital assets for the following reasons:

- 1) The employee's right to the benefits was subject to divestment if he died or was discharged from the Army before twenty years;
- 2) The amount of the benefit, being wholly within the discretion of the employer (Congress), was subject to change;
- 3) The employee made no contribution to the fund; and because the employer made all contributions, the retirement benefits represented fully taxable income to the recipient;
- 4) The benefits never existed as a fixed tangible asset with a lump-sum value, a cash value, or a surrender, loan redemption value; and
- 5) The anticipated retirement benefits could not be attached, garnished, assigned, sold, transferred, conveyed, or pledged prior to payment.<sup>117</sup>

At the same time the Colorado Court of Appeals decided *Ellis*, the Appellate Division of the Superior Court of New Jersey ruled in *White v. White*<sup>118</sup> that a pension plan is not subject to equitable distribution because the entire cost of the benefits of the pension plan was paid by the employer, the husband had no right of withdrawal, and the husband had not yet complied with the eligibility requirements necessary to receive a retirement income. The arguments presented in *Ellis* and *White* have in turn been followed by other courts.<sup>119</sup>

Another major category of states excluding pensions from division in dissolution cases are common law property, or "title" states.<sup>120</sup> Since

117. *Id.* at 235, 538 P.2d at 1349. It is interesting to note that this language, the essence of which precludes pension divisibility in *Ellis*, is set forth as a caveat in the Uniformed Services Former Spouses' Protection Act which *permits* such division.

118. 136 N.J. Super. 552, 347 A.2d 360 (App. Div. 1976).

119. *See, e.g., Baker v. Baker*, 546 P.2d 1325 (Okla. 1975) (military retirement pay is not property acquired during the marriage for purposes of property division); *Feeney v. Feeney*, 259 Ark. 858, 537 S.W.2d 367 (1976) (retirement pay from the armed forces is not personal property subject to division because it cannot be due and payable, assignable, sold, transferred, conveyed or pledged); *Parker v. Parker*, 227 Ark. 898, 302 S.W.2d 533 (1957) (military retirement pay is not marital property because it is not a fixed tangible asset such as a vested pension or profit-sharing plan that may be collected as a lump sum, rather it terminates at death and has no loan, surrender or redemption value); *Mueller v. Mueller*, 166 N.J. Super. 557, 400 A.2d 136 (1979) (a pension plan is not subject to equitable distribution because it cannot be withdrawn by the employee until some future time); *Baker v. Baker*, 120 N.H. 645, 421 A.2d 998 (1980) (military retirement pay is not marital property because it has no cash surrender value).

It should be noted, however, that New Jersey has since rejected the arguments in *White* and *Mueller* and decided that a vested pension plan which provides future benefits is an asset that results from direct and indirect efforts of both spouses, that the benefits are added pay for services to the employer, and that since it is acquired during the marriage, it is divisible. *See, e.g., Weir v. Weir*, 173 N.J. Super. 130, 413 A.2d 638 (1980), and *Kekkert v. Kekkert*, 177 N.J. Super. 471, 427 A.2d 76 (1981).

120. Title states are those states which recognize property held in one name as separate property and include only jointly held property in the marital assets pool. D. Freed & H. Foster, *supra* note 115, at 4079 (Sept. 28, 1982).

In common law property states courts have no general or equitable power to distribute property upon divorce except jointly-held property, and title alone controls (subject to constructive trusts and tracing of equitable title, and the law of gifts). These states are:

participation in a pension program is established in the employee's name, any rights flowing from such programs are considered separate property not part of the marital assets.<sup>121</sup>

Finally, some courts have ruled that pensions are properly includable in the valuation of income and assets used to determine ability to pay alimony and child support.<sup>122</sup> This distinction is based on the logic that an immediate division of a pension would decrease the pensioner's income, threaten the pensioner's economic stability, and thereby lessen the pensioner's ability to make alimony and child support payments.<sup>123</sup>

### *Divisibility of Benefits*

Not all equity states exclude pension benefits from the marital asset pool.<sup>124</sup> However, inclusion of the pension benefits in the asset pool depends upon whether the benefit is deemed property rather than a mere expectancy. Thus, in some states, if any attribute of property is *absent*, benefits are characterized as an expectancy,<sup>125</sup> while in other states, if any attribute of property is *present*, the benefits are characterized as property.<sup>126</sup> In *Pellegrino v. Pellegrino*<sup>127</sup> for instance, future benefits were included as marital property because the wage-earning

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1. Mississippi
  2. Virginia (after July 1, 1982, Virginia will become an "equitable distribution" state. See H.B. 691 signed into law).
  3. West Virginia
  4. South Carolina: Harry Golden, Esq., a leading South Carolina attorney, has informed us as follows: Although personal property has been subject to equitable distribution in this State for some time, real property has traditionally been distributed on the basis of title with joint property being divided equally; however, three exceptions to this now exist:
    - a. A resulting trust may exist in the assets titled in the name of one spouse where a specific sum at a specific time for a specific price was paid for real estate by the non-titled spouse.
    - b. Special equity may exist in cases where a non-titled spouse has made material contributions of industry and labor during a marriage which the contributions assist in the acquisition of property in the name of the other spouse.
    - c. And, now, the *Parrott* case (*Parrott v. Parrott*, S.C. Sup. Ct., filed May 26, 1982) adds a third real estate exception: that a homemaker spouse may have, upon divorce, an equitable interest in real property acquired by the wage earner spouse in his name when the homemaker spouse has foregone career opportunities at the behest of the primary wage earner and throughout a long marriage has remained in the home to rear children and provide a suitable family environment.

*Id.*

121. In deciding *McCarty*, the United States Supreme Court also took the position that military retirement pay was reduced compensation for reduced services and therefore the separate property of the service member. However, the Court did not rely on this characterization in reaching its decision. *McCarty*, 453 U.S. at 223.
122. See, e.g., *Howard v. Howard*, 196 Neb. 351, 242 N.W.2d 884 (1976); *Paulsen v. Paulsen*, 269 Ark. 523, 601 S.W.2d 873 (1980); *Baker v. Baker*, 120 N.H. 645, 421 A.2d 998 (1980).
123. See, e.g., *Holeman v. Holeman*, 459 P.2d 611 (Okla. 1969); *Baker v. Baker*, 546 P.2d 1325 (Okla. 1975).
124. See *supra* notes 111-113 and accompanying text.
125. See *Payne*, 82 Wash. 2d 573, 512 P.2d 736.
126. *Id.*
127. 134 N.J. Super. 512, 342 A.2d 226 (App. Div. 1975).

spouse had contributed to a pension plan. Similarly, in *Schafer v. Schafer*,<sup>128</sup> a Wisconsin court, finding Mr. Schafer had contributed to his retirement fund, ruled that although his interest at the time of the divorce had no recognizable cash surrender value<sup>129</sup> unless he retired, the fund had intrinsic value since it provided future financial security.<sup>130</sup> Thus, although the fund had no market value, the pension was includable in the marital asset pool.<sup>131</sup> In all of these cases, the conclusion that participation in a pension plan created a property right prefaced the courts' presumption that part of the property created during the marriage was marital property and properly subject to the states' equity division rule.

In community property states, pension benefits are generally divisible upon divorce.<sup>132</sup> This position has evolved from the rejection of pension benefits as gifts or gratuities (which are clearly considered expectancies) and an acceptance of the notion that pension benefits are deferred compensation for labor services.<sup>133</sup> Again, the courts return to the question of whether this compensation is property.<sup>134</sup> Here, the courts have focused their inquiry on defining the *point in time* at which compensation becomes a contingent property interest rather than a mere expectancy. The courts often appear to base these timing decisions on distinctions between matured payable benefits, unmatured vested benefits, or unmatured unvested benefits at the inception of employment.<sup>135</sup>

A series of California cases emphasizes that pension rights are property and, therefore, are divisible if the employed spouse has some certainty of receiving the benefits or recovering the funds. The California Supreme Court ruled in *French v. French*<sup>136</sup> that while pensions are

128. 3 Wis. 2d 166, 87 N.W.2d 803 (1958).

129. "Cash surrender value" is the amount available as cash upon voluntary termination of an insurance or annuity policy.

130. 3 Wis. 2d at 169, 87 N.W.2d at 806 (1958).

131. The Wisconsin courts recognized that including pension rights created difficulties and began detailing the process of valuation of benefits in a series of cases which include: *Leighton v. Leighton*, 81 Wis. 2d 620, 261 N.W.2d 457 (1978); *Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d 235 (1978); *Selchert v. Selchert*, 90 Wis. 2d 1, 280 N.W.2d 293 (Wis. Ct. App. 1979). See also a recent Michigan case in which the court of appeals ruled that an interest in a noncontributory pension plan constitutes a divisible marital asset even if the actual receipt of benefits is contingent on the employee-spouse's attaining a specific age. *Boyd v. Boyd*, 116 Mich. App. 774, 323 N.W.2d 553 (1982).

132. 8 FAM. L. REP. (BNA) 4065, 4094.

133. *Lee v. Lee*, 112 Tex. 392, 247 S.W. 828 (1923); *Wallace v. City of Fresno*, 42 Cal. 2d 180, 265 P.2d 884 (1954); *Payne v. Payne*, 82 Wash. 2d 573, 521 P.2d 736 (1973).

134. In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Court stated that to consider an interest in a benefit as property for Fourteenth Amendment purposes, a person must demonstrate more than need or mere expectation of receipt. A person must have a "legitimate claim of entitlement." 408 U.S. at 577.

135. Matured benefits are those which the insured employee is currently entitled to receive either by voluntarily terminating employment or by reaching a prescribed age or length of service. Vested benefits are those to which the insured employee has obtained an ultimate and irrevocable right to receive as a result of having met certain age and/or length-of-service employment requirements. Payment of vested benefits need not necessarily begin at the time of vesting, but rather occurs when retirement is effected.

136. 17 Cal. 2d at 778, 112 P.2d at 237 (1941).

contractual, they are "mere expectancies" until the employee meets all contingent requirements of the fund.<sup>137</sup> Later, in *In re Marriage of Brown*,<sup>138</sup> the court reversed its position, holding that pensions are a form of deferred compensation and that contractual rights in the pension are created at the time of employment. Thus, pensions represent an enforceable right even though possession or enjoyment of the contingent interest is at a future date. Since *Brown* moved the date at which pension benefits became a contractual right from the point of vesting established in *French* to the time of employment, unvested pension funds could no longer be classified as an expectancy. "Vesting" of rights occurs upon performance of an employment contract and is no longer related to the definitions of vesting provided by the Early Retirement Income Security Act.<sup>139</sup> While courts of several states have followed the reasoning of *Brown*,<sup>140</sup> others have declined to do so, retaining the vested/unvested distinction in determining the divisibility of pension rights.<sup>141</sup>

While courts in community property states commonly agree that pensions are a property right,<sup>142</sup> generally only property accumulated during the marriage is considered community property.<sup>143</sup> Therefore, if pension participation began prior to marriage and continued throughout, the pension is separate property. To the extent that marital resources were used to purchase rights or to fund the separate property (the continued pension participation during marriage), the recipient must reimburse the community asset pool for marital contributions made to the pension.

A review of rulings involving military pensions in community property states indicates that courts have not distinguished military retirement payments from other pension plans.<sup>144</sup> For instance, in both

137. *Id.* See also *Shaver v. Shaver*, 107 Cal. App. 3d 788, 165 Cal. Rptr. 672 (1980) in which the court of appeals held that a wife was not entitled to pension benefits which had not vested at the time of the dissolution, 1967. Moreover, even though she would have qualified after 1976, she could not seek her share later. See also *Williamson v. Williamson*, 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (1962) which stressed the element of certainty of benefits received.

138. 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976).

139. 29 U.S.C. § 1001 (1976 & Supp. II 1978).

140. See *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975); *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976); *Van Loan v. Van Loan*, 116 Ariz. 272, 569 P.2d 214 (1977); *In re Marriage of Skaden*, 19 Cal. 3d 679, 566 P.2d 249, 139 Cal. Rptr. 615 (1977).

141. See *Beggs v. Beggs*, 479 S.W.2d 598 (Ky. Ct. App. 1972); *Koontz v. Koontz*, 101 Idaho 51, 607 P.2d 1325 (1980).

142. 8 FAM. L. REP. (BNA) 4065 at 4094.

143. The exceptions are Louisiana and Texas, where the determination of whether pensions are separate or community property is made solely by the date of the original asset acquisition. *McCurdy v. McCurdy*, 372 S.W.2d 381 (Tex. Civ. App. 1963). The issue of whether title begins at the point of initial contribution or at vesting becomes important. See, e.g., *Williamson v. Williamson*, 457 S.W.2d 311 (Tex. Civ. App. 1970) which held that vesting occurred during the marriage so that property belonged to the community. See also *Herring v. Blakely*, 385 S.W.2d 843 (Tex. 1965); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970).

144. See, e.g., *In re Marriage of Fithian*, 10 Cal. 3d 592, 111 Cal. Rptr. 369, 517 P.2d 449, cert. denied, 419 U.S. 825, reh'g denied, 419 U.S. 1060 (1974), overruled on other grounds by *In re Marriage of Brown*, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976) in which the Supreme Court of California ruled that the principle that retirement benefits are community

Texas<sup>145</sup> and Washington,<sup>146</sup> courts have ruled that military pensions are earned property rights, not gifts or gratuities.

Regarding the issue of expectation versus property, the Washington Supreme Court, prior to the *Brown*<sup>147</sup> decision, held in *Wilder v. Wilder*<sup>148</sup> that the employee's "vested" right in military pension payments accrued from the time payment of benefits was certain. *Wilder* also held that whether the expectancy of a pension should be taken into account in property settlement depends on the probability that the employee will eventually enjoy the pension, and that this determination should be made on a case-by-case basis rather than under a blanket rule of expectancy.<sup>149</sup> Similarly, the Washington Supreme Court in *Payne v. Payne*<sup>150</sup> ruled that a husband's military pension was an "earned property right that accrues by reason of a specified number of years of service in a particular branch of the armed services."<sup>151</sup> Since the husband was entitled to receive the pension one year from the date of divorce, it was subject to division.<sup>152</sup>

In several cases, a military pension lacking some of the aspects of property was held *not* to invalidate the community property concept. In *In re Marriage of Karlin*,<sup>153</sup> the fact that the Federal Government could increase, diminish, or abolish the plan did not make the retirement plan a gratuity as to rights earned during the governing statute's effective life.<sup>154</sup> In *Mora v. Mora*,<sup>155</sup> the court declared that a service member's death or dishonorable discharge before retirement did not reduce his interest in retirement benefits to a mere expectancy. Finally, in *In re the Marriage of Fithian*,<sup>156</sup> the California Supreme Court ruled that whether an employee is required to make contributions to a retirement fund is irrelevant to the recognition of pension rights as community property.

Prior to *McCarty*, the remaining issue with respect to military pensions had been whether states had a right to apply their divorce law to a service member's Federal military retirement pay, or whether such an application conflicted with accomplishing congressionally established goals.<sup>157</sup> In *Kittleson v. Kittleson*,<sup>158</sup> the Washington Appellate Court

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property was not affected by whether the source of retirement funds was derived from a state, federal, military, or private employment relationship.

145. *Kirkham v. Kirkham*, 335 S.W.2d 393 (Tex. Civ. App. 1960).

146. *Morris v. Morris*, 69 Wash. 2d 506, 419 P.2d 129 (1966).

147. 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1976).

148. 85 Wash. 2d 364, 534 P.2d 1355 (1975).

149. *Id.* at 367, 534 P.2d at 1358.

150. 82 Wash. 2d 573, 512 P.2d 736 (1973).

151. *Id.* at 575, 512 P.2d at 738.

152. *Id.*

153. 24 Cal. App. 3d 25, 101 Cal. Rptr. 240 (1972).

154. *But see* cases cited *supra* note 119.

155. 429 S.W.2d 660 (Tex. Civ. App. 1968).

156. 10 Cal. 3d 592, 111 Cal. Rptr. 369, 517 P.2d 449, *cert. denied*, 419 U.S. 825 (1974).

157. *See Wissner v. Wissner*, 338 U.S. 655 (1949) where the Supreme Court held that under the Supremacy Clause, and given the specific language of the National Service Life Insurance Act, and construed in light of congressional intent, a service member had an absolute right to

held that a wife's award of a share of her husband's military pension was within the jurisdiction of the court and did not present a conflict with Federal law.

The issue of compatibility or conflict of state and Federal law was specifically addressed in both *McCarty*<sup>159</sup> and the Uniformed Services Former Spouses' Protection Act.<sup>160</sup> As a result of the Act, divisibility of military retirement pay as a part of a property settlement is once again a state issue<sup>161</sup> and states may make no distinction between military retirement benefits and other pension benefits. A review has revealed that in some states, these pension benefits will not be included in the marital asset pool subject to division for any of the following reasons: (1) the state treats such benefits as expectancies;<sup>162</sup> (2) the state regards them as separate property;<sup>163</sup> or (3) the state courts hold that a division threatens the individual's ability to make alimony or child support payments.<sup>164</sup> Other equity states,<sup>165</sup> using similar criteria for distinguishing expectancies from property, recognize retirement benefits as property earned during the marriage and, therefore, subject the pensions to division.<sup>166</sup> All community property states recognize pension benefits earned during marriage as divisible.<sup>167</sup>

### SOME ECONOMIC CONSEQUENCES

An important although subtle effect of both *McCarty* and the Act lies in the indirect impact that diverse property and division rules may have on current family saving patterns. Pension participation represents a major and growing share of family savings. In 1981, at least fifty million workers, over half of the full-time civilian labor force, were enrolled in at least one retirement plan other than Social Security.<sup>168</sup> Not only has workers' coverage expanded, but savings of this nature has grown. In 1977, the Federal Reserve estimated that twenty-seven percent of all family savings constituted pension participation.<sup>169</sup> Since this estimate included families with no retirement program, the actual proportion of pension for individuals with pensions could be

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choose the beneficiary of his National Service Life Insurance, and therefore community property states would have to refrain from invoking community property law that would frustrate the congressional plan. 388 U.S. at 658, 659.

158. 21 Wash. App. 344, 585 P.2d 167 (1978).

159. 453 U.S. at 220.

160. Act, *supra* note 3.

161. *Id.*

162. See *supra* note 110 and accompanying text.

163. *Id.*

164. *Id.*

165. See discussion *supra* note 115.

166. See *supra* note 110 and accompanying text.

167. See *supra* note 111 and accompanying text.

168. AMERICAN COUNCIL OF LIFE INSURANCE, 1981 LIFE INSURANCE FACT BOOK 49 (1981).

169. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, DIVISION OF RESEARCH AND STATISTICS, FLOW OF FUNDS ACCOUNTS, 1ST QUARTER 1980 at I 80.

much higher. Thus, military families are likely to rely heavily on their pension program as a savings mechanism.

For years, economists have debated whether Social Security and private pension plans reduce an individual's rate of voluntary savings and encourage early retirement.<sup>170</sup> They note that saving transfers resources from employment years to retirement years. Pension annuities reduce the risk of outliving one's assets during retirement, thereby reducing uncertainty. It is possible that savings patterns of families participating in a pension program are smaller than the savings of families who do not participate.

Diagram I (see Appendix) illustrates the impact of pensions and the variety of property division rules upon asset distribution to the husband and wife at the time of divorce. For ease of exposition, the illustration traces the situation of one family under various assumptions. On divorce, the husband and wife each receive a share of the marital assets in accordance with the state's division rule. The wife's share is depicted by the shaded area.<sup>171</sup> Although the diagram approximates a fifty-fifty split, other applicable division rules could apply. If empirical evidence concerning the effect of pensions on savings is correct, the same family will face less uncertainty with respect to future retirement income if it participates in a pension plan. Consequently, its total private savings will be less.

*McCarty* removed military pensions from those marital assets subject to division. Block B therefore represents the *McCarty* division rule. Again, the wife's share of the assets is represented by the shaded area of block B. After the *Uniformed Services Former Spouses' Protection Act* was passed, military pensions became divisible in states that recognize a spouse's participation in a retirement program as marital property. Therefore, block B now represents the asset division in states not recognizing pensions as property, or in states that recognize it as the service member's separate property. Block C illustrates the division for

170. The direction of the economic impact of private pensions on savings is not clear. Theoretically, in life-cycle models of saving and consumption which are analyzed in a world of certainty, perfect labor and capital markets, and absent any taxes, an increase in pension savings would be offset by a decrease in other private savings. In fact, deferred pension benefits receive favorable income tax treatment. Imperfect capital markets and institutional constraints in the financial structure of pension plans make it difficult for individuals to borrow against their future benefits. Uncertainty exists about the real value of future benefits and the length of time one will live past retirement. These market imperfections and uncertainties operate both to encourage greater savings (tax benefits, uncertainty of lifespan, or underestimating future real benefits) or depressing savings (illiquidity of capital markets, overestimating future benefits). Empirical evidence seems to suggest that, on balance, the presence of pensions reduces other private savings, reduces lifetime savings, or induces earlier retirement. A. BLINDER, R. GORDON AND D. WISE, *AN EMPIRICAL STUDY OF THE EFFECTS OF PENSIONS AND THE SAVING AND LABOR SUPPLY DECISIONS OF OLDER MEN* (1981); A. MUNNELL, *THE EFFECT OF SOCIAL SECURITY ON PERSONAL SAVINGS*, ch. 5 (1974); M. FELDSTEIN, *DO PRIVATE PENSIONS INCREASE NATIONAL SAVINGS?* (Harvard Institute of Economic Research, Discussion on Paper No. 553, 1977).

171. Assume, for purposes of this example, that the husband is the wage earner and pension holder.

states that include the value of pensions in marital property subject to division. From this simplified example, it is clear that the Act effectively causes each spouse's share of total assets to be divided quite differently, depending on the couple's residence at the time of divorce.

Given the substantial difference in asset distribution resulting from diverse state rules, it is appropriate to consider the number of persons subject to divisions illustrated by blocks B and C. No specific data on divorce in military families either in the aggregate or by state of residence is available. Therefore, one can only approximate the impact by studying the state of residence of all military families, not just families involved in a divorce. The Act potentially affects both retired and active personnel and their spouses depending on their state of residence when the dissolution petition is filed. One can determine the retired service member's residence from studying retirement payments by state as illustrated by the flow of funds accounts.<sup>172</sup> A review of these accounts reveals that in 1980 fifty percent of military retirement pay<sup>173</sup> went to California, Florida, Texas and Virginia.<sup>174</sup> California and Texas are community property states.<sup>175</sup> California divides assets equally,<sup>176</sup> while Texas divides assets equitably if the pension is recognized as marital property, and otherwise "reimburses" the marital estate for any contributions to the service member's separate property.<sup>177</sup> Florida and Virginia are recent equitable distribution states, and have not yet addressed the question of divisibility of military retirement pay.<sup>178</sup>

In addition to the 1,300,000 persons already retired, another 2,050,000 people who are presently serving on active duty are earning credit toward military retirement.<sup>179</sup> As *McCarty* noted, active-duty personnel are assigned to duty stations and generally do not elect their own state of residence.<sup>180</sup> In 1981, almost twenty-five percent of these active-duty service members were stationed in California and Texas, where military retirement pay is recognized as community property.<sup>181</sup> From information provided about residences of retired and active-duty

172. See generally *supra* note 169.

173. In 1980, the total amount of funds paid out as military retirement pay benefits was \$6,522,253,000. EXECUTIVE OFFICE OF THE PRESIDENT, COMMUNITY SERVICES ADMINISTRATION, GEOGRAPHIC DISTRIBUTION OF FEDERAL FUNDS IN SUMMARY, FISCAL YEAR 1980, 2 (1981).

174. *Id.*

175. D. Freed & H. Foster, *supra* note 115, at 4065, 4079.

176. See, e.g., *In re Marriage of Buikema*, 139 Cal. App. 3d 689, 188 Cal. Rptr. 689 (1983) (superior court's equal division of husband's military retirement pension would not be reversed by retroactive application of *McCarty* since Congress overruled *McCarty*).

177. See, e.g., *United States v. Stelter*, 567 S.W.2d 797 (Tex. 1978) (when community military retirement benefits are before a divorce court, the court should consider them with all other property subject to "just and right" division).

178. D. Freed & H. Foster, *supra* note 115, at 4065, 4080-82.

179. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 362 (1981).

180. 453 U.S. at 234.

181. U.S. DEPARTMENT OF COMMERCE, *supra* note 179.



service members, clearly many families will face a block B division, and others will have a block C division (see Appendix). Thus, while the state of residence only indicates whether retirement pay is divisible, this potential for different divisions may cause the family's savings rates to change significantly after moving.

### STATUS OF *McCARTY* ARGUMENTS

Reviewing the states' varying treatment of pension benefits for purposes of property division, the key divisibility determinants have been: (1) whether benefits are expectancies or property; (2) if classified as property, whether the benefits are separate or marital; and (3) whether such pension benefits are available for division and distribution. *McCarty* in many respects summarily dismissed the foregoing factors by holding that upon divorce, Federal law precludes a state court's dividing military nondisability retirement pay pursuant to community property laws. Since the holding in *McCarty* is based upon federal preemption, the nondivisibility finding would apply regardless of a state's division rule. The *McCarty* Court did not base its decision on whether such pension is property.<sup>182</sup> *McCarty* effectively made the treatment of military retirement pensions upon divorce equal for all couples regardless of their state of residence by declaring that *no* state could place the pension in the marital asset pool.<sup>183</sup>

The Uniformed Services Former Spouses' Protection Act focuses on creating a different type of equality by treating various pension plans equally. While not concerned with the possibility of different treatment *between* states, the Act's emphasis is on creating equal treatment *within* states. In this manner, the Act affirmatively declares military retirement pensions to be property.<sup>184</sup> However, the Act does not answer the question of whether such property should be viewed as separate or marital property. Instead, the Act leaves this decision to the individual states. Again, unlike *McCarty*, the Act clearly states that such pensions are not necessarily separate property. Lastly, the Act establishes absolutely that at least a portion of the military retirement pay may be distributed to a former spouse.

A third equal treatment issue is suggested by the military service members' spouses and, in some respects, combines the equality considerations in both *McCarty* and the Act. Like *McCarty*, military spouses favor a pension treatment not dependent on the couple's state of residence or domicile at a particular time. Unlike the *McCarty* holding, however, spouses seek that protection which is only posited as a possi-

182. One might imply from the effect of *McCarty* that if such pensions were property, they were the sole property of the service member and are therefore not part of the marital asset pool, not subject to division and certainly not available for distribution.

183. 453 U.S. at 223.

184. Act, *supra* note 3, § 1002(a) (to be codified at 10 U.S.C. § 1408(c)(1)).

bility in the Act – the inclusion of the military retirement pay as a marital asset subject to division upon divorce.

In particular, military spouses argue that their family responsibility, which includes moving to new locations, effectively precludes them from working in one place long enough to satisfy vesting requirements enumerated in ERISA.<sup>185</sup> Consequently, they argue, the military effectively denies them access to a pension in their own names. If implemented, this argument would cause military retirement pensions to be divisible regardless of the rules applicable to other pensions. Their proposal would result in consistency among states but inconsistency among types of pensions.

Despite this argument's appeal, its validity depends upon the existence of a distinction between the military pension and other types of pensions. Specifically, one must determine whether sufficient attributes attach to *military* pensions so as to cause them to always be considered divisible marital assets. Generally, military families move more frequently and have less control over location than other families. Often, they have no say in whether to move at all. However, in light of current economic conditions, and increased, albeit not always "voluntary", mobility for job hunting, the strength of the distinction weakens. Since property division rules sometimes vary greatly between states, any person or family who chooses to move or is moved by a company is likely to be subject to different division rules in his new state of residence than he was in his former state of residence. Military pensions are certainly not the only asset covered by such rules; thus anyone, whether or not in the military, is likely to have some type of asset division affected by his residence in a state at the time of divorce. It seems unlikely that people choose their residence based upon divorce laws regarding property division. However, one could argue that the jurisdictional limitation imposed by the Act which prohibits jurisdiction based solely on a service member's presence in the state due to military orders,<sup>186</sup> provides the service member with a choice of forums for divorce purposes. This choice is not usually available to the general populace.

The Uniformed Services Former Spouses' Protection Act does not address or does not resolve a number of other issues raised in *McCarty*. The Supreme Court in *McCarty* was concerned in part about the effect of pension divisibility on a service member's desire to enlist or reenlist.<sup>187</sup> If receiving a pension benefit was a major incentive for a military person to continue his or her career, providing less than this total expectation might lessen or destroy any incentive. The Court stressed the importance of this incentive because of the military's special nature and its present dependence on a volunteer service. While the Act does not directly address this concern, the offset provisions indicate that mil-

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185. 29 U.S.C. § 1053(a)-(d) (1976 & Supp. II 1978).

186. Act, *supra* note 3, § 1002(a) (to be codified at 10 U.S.C. § 1408(c)(4)).

187. 453 U.S. at 234-35.

itary retirement pay could be diminished for a number of reasons<sup>188</sup> other than divisibility in a property settlement. Arguably, the fifty percent provision in the Act greatly reduces a service member's expectation. However, this is not the only provision which does so.<sup>189</sup> Lastly, it is impossible to predict whether the divisibility of military retirement pay provided for in the Act will have such an effect. One can argue that the potential "horrible" effect which the Court envisions, particularly for reenlistment, is no different than the situation involving a private sector employee who knows his pension benefit might be diminished by divorce and hence chooses to leave his employer before the pension can vest, thereby denying any portion of the benefit to his former spouse. Again, the Court based its concern partly on the special nature of the military, but the distinction seems insufficient to warrant the *McCarty* conclusion.

The *McCarty* Court also suggested that allowing division of military retirement pay upon divorce would in effect discriminate against widows or widowers.<sup>190</sup> The military retirement pay benefit ceases on the service member's death. Consequently, a widow or widower, absent a member's annuity election, would not receive any portion of the retirement pay following the member's death. Similarly, it should follow that if a divorce decree awards an ex-spouse a portion of the member's retirement pay, such payment would cease upon the member's death.<sup>191</sup> Presumably, *McCarty* does not address this situation because neither the widow nor the ex-spouse of the deceased would continue to receive payment after the member's death.

Instead, the Supreme Court's concern was generated by the situation where, in effecting a divorce settlement, a court assessed the present value of the member's future entitlement to retirement pay. If this value was then added to the total marital asset pool and the ensuing award was based upon each party receiving a certain proportion of the pool but not necessarily a specific asset,<sup>192</sup> then the ex-spouse could receive more than a current widow. For instance, the *McCarty* Court described a case wherein the couple's total assets, including the military retirement pay, are valued at \$60,000 and, further, that the court awarded the wife a \$30,000 house as her share and the husband retained the remaining assets, *including* sole entitlement to his military retirement pay. Following the divorce, he remarried and died shortly thereafter. The widow would not receive part of the husband's retirement pay, absent an SBP annuity if the election were made, but the ex-spouse would already have received the value of the pay through her

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188. Act, *supra* note 3, § 1002(a) (to be codified at 10 U.S.C. § 1408(a)(4)(A)-(F)).

189. *Id.*

190. 453 U.S. at 227-28.

191. Indeed, the Act specifically states that payments cease on the member's death. Act, *supra* note 3, § 1002(a) (to be codified at 10 U.S.C. § 1408(d)(4)).

192. However, in this case, it need not necessarily be an amount paid directly out of the retirement benefit.

share of the property settlement.<sup>193</sup>

The Act, however, does not address this situation. Indeed, any problem posed by such an inequity may be exacerbated by the Act's minimum requirement of a ten year marriage as a prerequisite to garnishment.<sup>194</sup> If a marriage is dissolved prior to that ten year period, or if the member's credible service is less than ten years, a court may still value the military pension in order to determine the total value of the couple's asset pool.<sup>195</sup> Since division of the pension itself will not be possible, the court may be more inclined to assign a present value to the pension and give the nonmember spouse a substitute asset.

However inequitable the division of military pensions seems, unless widows or widowers of military members are singled out for special treatment, the division problem suggested above arises in numerous potential divorce settlements. For instance, assume that a couple's total marital or community assets are valued at \$60,000, which represents \$30,000 of stock and a \$30,000 house. Upon divorce, the wife receives the house and the husband receives the stock. He later remarries and sometime before his death the stock drops in value to \$5,000. Meanwhile, the house's value escalates to \$60,000. Obviously, the husband's widow (second wife) will receive fewer benefits than the ex-spouse.

As a second example, assume that the couple's total assets prior to divorce were \$60,000, half of which was a house and half a small business. He remarries, and the business fails. Again, his widow will receive less than the ex-spouse. Of course, in either of the foregoing situations, the economic fate of either spouse could be reversed and eventually the widow could inherit much more than the ex-spouse. In all cases, division is a game of chance which is not peculiar to the military family. In any event, a second spouse can be protected if the military member (or private business person) provides an annuity.

Lastly, it does not seem unreasonable to suggest that even if the divisibility of military retirement pay creates a disparity between an ex-spouse and a widow or widower, such a disparity is not inherently inequitable. If the service member's first marriage lasted twenty years and that time period included a substantial portion of the member's credible service, and the member dies within a few years of remarriage, it seems reasonable and equitable to expect the former spouse to receive more of a return from the retirement pay than the widow or widower. Indeed, in states which do not consider the military retirement pay as divisible community property, the ex-spouse will not receive any portion thereof. However, if the service member has elected to provide an annuity for the second spouse, then the widow or widower will receive a return on the pension and the former spouse will not, regardless of length of the member's marriages.

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193. *McCarty*, 453 U.S. at 227-28.

194. Act, *supra* note 3, § 1002(a) (to be codified at 10 U.S.C. § 1408 (d)(2)).

195. *Id.*

## CONCLUSION

While the Uniformed Services Former Spouses' Protection Act leaves a number of issues unanswered, it clearly resolves the *McCarty* Court's concern with the absence of a legislative intent regarding the application of state property and divisibility rules to military retirement pay. The Act clearly indicates that Congress intended these rules to be a prerogative of the states, and not the Federal Government or federal courts. It is therefore consistent with this intention that the Act resolves neither the issue of retirement pay as separate or marital property, nor the question of divisibility. States may, on an individual basis, continue to hold as the Supreme Court did in *McCarty*, that military retirement benefits are separate property. The Act merely makes this choice a matter of state law.

The effect of the Act on other nonmilitary pension plans awaits future litigation and legislative action. Those favoring the concept of divisibility of all pensions are likely to use the Act as an argument for such distribution. Such an argument might be particularly persuasive in light of Congress' implicit determination that military pensions need not be treated differently than other types, in spite of the plethora of reasons for making such a distinction as suggested by the Supreme Court in *McCarty*. This argument may be offered to encourage legislators, on both the state and federal levels, to specifically provide for pension division and to influence judicial decisions in areas undefined by state law.<sup>196</sup>

In the final analysis, there is simply no way to accurately measure or predict the effect that the Act will have on the issues of enlistment, reenlistment, retirement timing, or provision of annuities. While it seems unlikely that the possibility of division of retirement pay upon divorce will be a major decision factor for any of the foregoing reasons, critics of the Act may prove to be correct. Should disastrous results follow, it seems reasonable to assume that Congress will affect a legislative remedy. For the present, the Act is at least potentially a vehicle for the equitable recognition of the contribution of a service member's spouse, who may now gain access to some portion of a pension.

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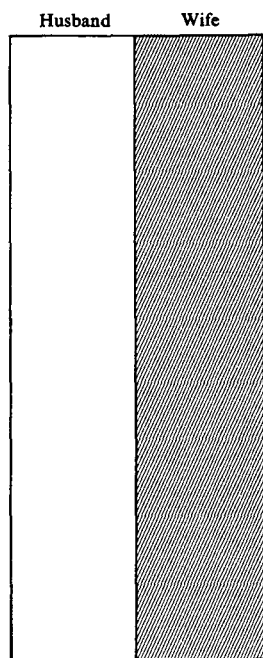
196. Indeed, in August, 1982, the Missouri Supreme Court reversed itself on the issue of pension divisibility. The court ruled that nonmatured pensions were too unpredictable to be divisible. Pension benefits may now be divided. *Kuchta v. Kuchta*, 636 S.W.2d 663 (Mo. 1982).

## APPENDIX

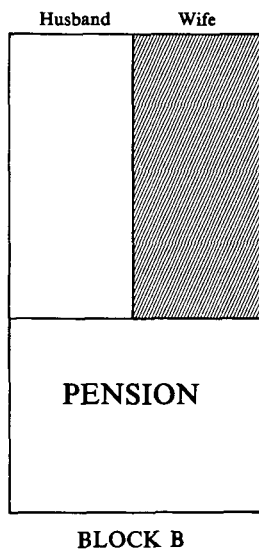
## DIAGRAM I

*FAMILY SAVINGS AND THE EFFECT OF  
STATES' PROPERTY DIVISION RULES*

Savings of families with no pension plan.



Savings of families with pension plan not subject to division.



Savings of families with pension plan subject to division.

